Ecooils Sdn Bhd v Raghunath Ramaiah Kandikeri

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–516 OF 2007
SUPANG LIAN J
17 OCTOBER 2012

Civil Procedure — Injunction — Injunction to restrain — Injunction to restrain former employee from using confidential information — Whether employee breached confidentiality clause in letter of employment for personal gain — Whether defence bare denial of claim

The plaintiff sought a permanent injunction and damages against the defendant for breaching the terms of a confidentiality clause in a letter appointing him as manager of its factory's engineering and project services department. The plaintiff was in the business of recycling palm oil or vegetable oil solid waste known as Spent Bleach Earth ('SBE') discarded by palm and vegetable oil refineries. The plaintiff alleged the defendant wrongfully used and/or disclosed to third parties confidential information, technology or trade secrets belonging to the plaintiff for his personal gain. Inter alia, the plaintiff claimed that the defendant, during his employment, established a company in India through which he disclosed and disseminated the plaintiff's technology whilst establishing a business of his own at the same time. It was alleged that he contacted a few of the plaintiff's clients for business opportunities, using the plaintiff's business information, and that he even attempted to sell to a third party equipment which used the same technology the plaintiff used. Besides seeking damages, the plaintiff sought to permanently injunct the defendant from disclosing confidential information, technology and trade secrets belonging to the plaintiff. The defendant denied the plaintiff's claim and contended that the SBE Boiler the plaintiff used was not its invention because such equipment had not only been used in India for many years but that there was a huge sale of that equipment globally. The defendant also said the plaintiff's technology was not protected by copyright or patent.

Held, allowing the claim:

(1) The defendant's case was a bare denial. There simply was no evidence forthcoming to rebut the cogent evidence of PW4, PW5, PW6 and PW7 supported by documentary evidence which showed the defendant had misused and disclosed to third parties the confidential technology and confidential information of the trade secrets of the plaintiff whilst under the plaintiff's employment. This was in breach of the terms and conditions of the confidentiality clause in his letter of appointment (see paras 66–67).

(2) Nothing turned on the defendant's allegation that the SBE boiler was not the plaintiff's invention; that it had been in the market in India for many years and that there were huge sales of it in the global market. This was because the defendant did not adduce evidence to establish that others had the technology or had the specially designed Non Electric Furnace (NEF). No evidence was adduced of the existence of such NEF in India or of sales of it in the thousands in the global market (see para 21).

(3) As to the argument that the plaintiff failed to prove that its technology was unique or novel, that was not the point. The plaintiff's cause of action was premised on breach of the confidentiality clause or breach of confidence. The issue was not whether the information of the plaintiff's technology that was sought to be protected was unique or novel but whether it was a trade secret or confidential information (see para 22).

(4) The plaintiff had proven on balance of probabilities that its technology of using SBE as fuel to produce energy and steam in a specially designed SBE Bio Mass Boiler was highly confidential information and a trade secret and that, in addition, it had trade secrets in the form of confidential information on the cost, benefits, pricing, cost-saving benefits, specific requirements of the specially designed SBE Bio Mass Boiler and the names of its SBE suppliers and customers. The defendant was employed in a capacity where such 'confidential' material was habitually handled (see para 25).

(5) The evidence was clear that the defendant had created and established a company ('KIS') as a vehicle to masquerade his activities of disclosing and disseminating the plaintiff's confidential technology, information or trade secrets to third parties whilst quietly establishing his business at the same time. This was the more obvious considering that it was only after the defendant had joined the plaintiff's employment that KIS came to be established (see para 55).

[Bahasa Malaysia summary

Plaintif memohon injunksi dan ganti rugi kekal terhadap defendan kerana melanggar klausa kerahsiaan dalam surat pelantikannya sebagai pengurus jabatan perkhidmatan kejuruteraan dan projek kilangnya. Plaintif menjalankan perniagaan mengitar semula minyak sayuran atau sisa pejal minyak sayuran yang dikenali sebagai Spent Bleach Earth ('SBE') yang dibuang hasil daripada kilang penapisan minyak sawit dan sayuran. Plaintif menghujahkan bahawa defendan telah secara salah menggunakan dan/atau mendedahkan maklumat sulit, teknologi atau rahsia dagangan milik plaintif kepada pihak ketiga untuk keuntungan peribadinya. Antara lain, plaintif mendakwa bahawa defendan, ketika perkhidmatannya, telah menubuhkan satu syarikat di India yang melaluinya, dia mendedahkan dan menyebarkan teknologi plaintif sambil mewujudkan perniagaannya sendiri pada masa yang

sama. Dihujahkan bahawa dia telah menghubungi beberapa pelanggan plaintif bagi peluang perniagaan, menggunakan maklumat perniagaan plaintif dan bahawa dia cuba untuk menjual peralatan yang menggunakan teknologi sama yang digunakan oleh plaintif kepada pihak ketiga. Selain memohon ganti rugi, plaintif memohon untuk menghalang defendan daripada mendedahkan maklumat sulit, teknologi dan rahsia dagangan milik plaintif. Defendan menafikan tuntutan plaintif dan menghujahkan bahawa SBE Boiler yang digunakan oleh plaintif bukanlah ciptaannya kerana peralatan tersebut bukan sahaja telah digunakan selama bertahun-tahun di India tetapi juga bahawa terdapat jualan besar peralatan tersebut di seluruh dunia. Defendan juga menghujahkan bahawa teknologi plaintif tidak dilindungi oleh hak cipta atau paten.

Diputuskan, membenarkan tuntutan:

(1) Kes defendan adalah penafian semata-mata. Hanya terdapat keterangan akan datang untuk menyangkal keterangan meyakinkan oleh PW4, PW5, PW6 dan PW7 yang disokong oleh keterangan dokumentar yang menunjukkan bahawa defendan telah menyalah guna dan mendedahkan teknologi rahsia dan maklumat rahsia dagangan plaintif kepada pihak ketiga semasa berkhidmat untuk plaintif. Ini adalah satu pelanggaran terma dan syarat klausa kerahsiaan dalam surat pelantikannya (lihat perenggan 66–67).

(2) Tiada apa yang mengesahkan dakwaan defendan bahawa SBE Boiler tersebut bukanlah ciptaan plaintif; bahawa ia berada di pasaran India selama bertahun-tahun dan bahawa terdapat jualan besarnya di pasaran dunia. Ini adalah kerana defendan tidak mengemukakan keterangan untuk membuktikan bahawa pihak-pihak lain mempunyai teknologi tersebut atau telah dengan khususnya mereka Non Electric Furnace ('NEF'). Tiada keterangan yang dikemukakan bahawa kewujudan NEF India atau jualannya dalam ribuan dalam pasaran dunia (lihat perenggan 21).

(3) Berkenaan hujahan bahawa plaintif gagal membuktikan bahawa teknologinya unik atau berbeza, bukanlah menjadi pertikaian. Kausa tindakan plaintif adalah berasaskan pelanggaran klausa kerahsiaan atau pelanggaran kerahsiaan. Isunya bukanlah sama ada maklumat teknologi plaintif yang dipohon untuk dilindungi adalah unik atau berbeza tetapi sama ada ia adalah rahsia dagangan atau maklumat rahsia (lihat perenggan 22).

(4) Plaintif telah membuktikan atas imbangan kebarangkalian bahawa teknologinya yang menggunakan SBE sebagai bahan api untuk menghasilkan tenaga dan wap dalam SBE Bio Mass Boiler yang direka khas adalah maklumat sulit dan satu rahsia dagangan dan bahawa, tambahan lagi, ia mempunyai rahsia-rahsia dagangan dalam bentuk

maklumat sulit mengenai kos, manfaat, harga, manfaat penjimatan kos, keperluan-keperluan khusus SBE Bio Mass Boiler yang telah direka khas dan nama-nama pembekal-pembekal dan pelanggan-pelanggan SBE. Defendan diambil berkerja dalam kapasiti yang mana material 'rahsia' sedemikian lazimnya ditangani (lihat perenggan 25).

(5) Keterangan adalah jelas bahawa defendan telah menubuhkan dan mewujudkan satu syarikat ('KIS') sebagai tempat untuk menyamarkan aktiviti-aktivitinya yang mendedahkan dan menyebarkan teknologi rahsia plaintif, maklumat atau rahsia dagangan kepada pihak ketiga sambil dengan diam menubuhkan perniagaannya sendiri. Ini adalah lebih ketara memandangkan bahawa hanya selepas defendan menyertai plaintif barulah KIS ditubuhkan (lihat perenggan 55 & 57).]

Notes

For cases on injunction to restrain, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3555–3557.

Cases referred to

Coco v AN Clark (Engineers) Ltd [1969] RPC 41, Ch D (refd)

Schmidt Scientific Sdn Bhd v Ong Han Suan [1997] 5 MLJ 632, HC (consd)

Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling [2008] 7 MLJ 903; [2008] 8 CLJ 386, HC (folld)

Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297; [2010] 1 LNS 444, HC (consd)

Legislation referred to

Evidence Act 1950 s 45

T Prem Anand (Prem Anand & Associates) for the plaintiff.
George Varughese (K Ramesh with him) (George Varughese) for the defendant.

Supang Lian J:

THE INTRODUCTION

[1] The plaintiff Ecooils Sdn Bhd ('Ecooils' or 'the plaintiff') brought this action against the defendant Raghunath Ramaiah Kandikeri ('Ragunath' or 'the defendant') for a permanent injunction and damages arising from the breach by the defendant of the terms of a confidentiality clause in his letter of appointment. After a full trial, I found for the plaintiff; granted the permanent injunction and ordered for assessment of damages before the deputy registrar.

The defendant has appealed the decision.

THE BACKGROUND FACTS

[2] The plaintiff is in the business of recycling palm oil or vegetable oil solid waste, also known as Spent Bleaching Earth ('SBE'), discarded by palm and vegetable oil refineries. When SBE is collected from the refineries, it contains about 20%–23% crude palm or vegetable oil. In its hands, the plaintiff puts it to use for two major purposes. Firstly, the SBE is processed to extract the oil content that is then processed into industrial grade palm oil ('IGPO'). The plaintiff then sells the IGPO as base oil for the animal feed industry as well as lubricants in the steel mill industries. The SBE, after going through the process of oil extraction, now contains only about 5%–7% oil. In that state, it is called deoiled bleaching earth or 'DOBE'. The plaintiff burns the DOBE as fuel in a custom made non electric furnace ('NEF') or boiler in order to generate steam and energy to run the plaintiff's production at its factory in Pasir Gudang, Johor. This is the second major use of the SBE by the plaintiff.

[3] The defendant is an Indian national. By a letter of appointment of 17 February 2005, the plaintiff appointed him as the manager of the Engineering and Project Services Department of the plaintiff's factory in Pasir Gudang. The letter of appointment has a confidentiality clause that reads as follows:

> You will keep all information confidential and not disclose or use either during or subsequent to this employment any secret or confidential technology, information or trade secret. You will communicate all inventions made by you to the company in the course of employment and assign the same to the company.

After just over two years of employment, the plaintiff terminated the defendant's service effective from 13 April 2007 by issuing a letter of termination of the same date. Thereupon, the defendant filed a claim in the Industrial Relations Tribunal but that was withdrawn on 26 May 2007. The plaintiff thereafter filed the present civil suit on 27 July 2007 to seek a permanent injunction to restrain the defendant from disclosing or disseminating the plaintiff's confidential business information and trade secrets. In the meantime on 6 May 2009, the plaintiff successfully obtained an inter parte interim injunction in the High Court at Johor Bahru to restrain and prohibit the defendant from using or disclosing the plaintiff's confidential information or trade secrets to the third parties until the disposal of the present suit.

THE PLAINTIFF'S CASE

[4] The plaintiffs alleged that the defendant, in breach of the terms of the

confidentiality clause in the letter of appointment, had wrongfully used and/or disclosed confidential information, technology or trade secrets belonging to the plaintiff for the defendant's personal gain and interest. The particulars of the breach of the defendant are specified in para 7 of the SOC and they are as follows:

(a) that the defendant has established a company in India known as Knowledge Integration Services (India) Pvt Ltd ('KIS') whereby the defendant was appointed as senior consultant for industrial solutions;

(b) the defendant through KIS approached a few of the plaintiff's clients with the hope of obtaining business opportunities by using the plaintiff's business information; and

(c) the defendant attempted to sell to IOI an equipment known as 'Waste Heat Boiler' which clearly and precisely used the information and expertise of the plaintiff.

[5] The plaintiff claimed that save and except the defendant was restrained by a permanent injunction, the defendant would continue to breach the terms of the letter of appointment by wrongfully using and/or disclosing the plaintiff's business information and expertise for the defendant's personal benefit and gain. Wherefore, the plaintiff prayed for the following reliefs:

(a) a permanent injunction to restrain the defendant from disclosing confidential information, technology, trade secrets belonging to the plaintiff;

(b) general damages;

(c) interest; and

(d) costs.

THE DEFENCE

[6] The defendant alleged that the plaintiff had taken advantage of him and he thereby had executed the letter of appointment under duress although he did not agree with the terms. He denied disclosing or using any information relating to the plaintiff's business and denied using the plaintiff's business information for his personal gain. He said that the restraining terms and conditions in the letter of appointment were only applicable to inventions of the defendant, which are patented or given 'copyrights' in the name of the plaintiff. The defendant denied setting up Knowledge Integration Services (India) Pvt Ltd ('KIS') or that he was a member of the board of directors. He denied using the plaintiff's information to meet with the plaintiff's customers

and denied ever using the business information and expertise of the plaintiff for his personal interest and gain. Further, he denied selling a product known as 'waste heat boiler' to the company called IOI. In any event, the said 'waste heat boiler' is not the plaintiff's invention because the said equipment has been in the market in India for many years with sales in the thousands in the global market. Thus, the waste heat boiler is not a result of the plaintiff's expertise or technology. The defendant had not breached or violated any of the terms and conditions of the letter of appointment. Hence, the defendant prayed for the plaintiff's claim to be dismissed with costs.

THE ISSUES FOR TRIAL

[7] From the pleadings and the statement of issues to be tried (bundle F), the issues for trial were as follows:

(a) whether the defendant had executed the letter of appointment of 17 February 2005 under duress;

(b) whether the confidentiality clause in the letter of appointment creates a duty of good faith, fidelity and confidence that prohibits the defendant from disclosing or using the plaintiff's confidential technology, information or trade secrets;

(c) whether the plaintiff possessed information of technology that is confidential in nature and other trade secrets;

(d) if so, whether the defendant had access to the information of the confidential technology and trade secrets during his employment with the plaintiff;

(e) if so, whether the defendant had used, disclosed, divulged and disseminated the plaintiff's confidential technology information and other trade secrets thereby breaching the terms of the confidentiality clause;

(f) whether the defendant is required to be restrained by an injunction from continuing to violate the terms and conditions of the confidentiality clause; and

(g) whether the plaintiff has suffered loss and damages as a result of the defendant misusing, disclosing and disseminating the plaintiff's confidential information and trade secrets.

DURESS AND UNFAIR ADVANTAGE

[8] The defendant did not adduce evidence of this at the trial. Neither was

the issue addressed during submissions. I considered this defence abandoned.

WHETHER THE CONFIDENTIALITY CLAUSE CREATES A DUTY OF GOOD FAITH, FIDELITY AND CONFIDENCE THAT PROHIBITS THE DEFENDANT FROM DISCLOSING OR USING THE PLAINTIFFS CONFIDENTIAL TECHNOLOGY, INFORMATION OR TRADE SECRETS

[9] In *Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon* [2010] 8 MLJ 297; [2010] 1 LNS 444 Abdul Malik Ishak J, now judge of the Court of Appeal, considered the issue of good faith and fidelity that is required of an employee and said:

> [73] The defendant as an employee of the plaintiff owed a duty of fidelity to his employer, namely, the plaintiff. An express duty of fidelity may be imposed by a contract of employment (*Reid and Sigrist Ld v Moss and Mechanism Ld* [1932] 49 RPC 461) and, in the context of this case, the letter of offer imposed that duty of fidelity to the defendant.
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> [74] According to the case of *Tipping v Clarke* [1843] 2 Hare 383, the right of an employer to restrain an employee or ex employee from divulging confidential information to others is well established. And the employer can also restrain the employee from making use of the confidential information for his own benefit (*Normalec Limited v Britton* [1983] FSR 318).

With respect, I am in total agreement with the passage quoted above.

[10] Kamalanathan Ratnam JC, as he then was, also considered the point in *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632. He said at pp 644–645:

> I find that this duty of good faith or fidelity does not just require that the employee refrains from misuse or from disclosing information whilst still in the employment of the plaintiff. To my mind, there is also an implied duty that prohibits the employee from using any confidential information obtained during his employment without the employer's consent for his own or someone else's use after the employment contract ends. … In *Robb v Green* [1895] 2 QB 315, … Lord Esher MR said at pp 316–317:
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> > The question is whether such conduct was not what any person of ordinary honesty would look upon as dishonest conduct towards his employer and a dereliction from the duty which the defendant owed to his employer to act towards him with good faith. I think the judge was perfectly justified in holding that such conduct was a breach of the trust reposed in the defendant as the servant of the plaintiff in his business. The question arises whether such conduct is a breach of contract. That depends upon the question whether in a contract of service the court can imply a stipulation that the servant will act with good faith

towards his master. In this case, it is said that the contract of service was in writing; but there is nothing in the express terms of the contract that contradicts such an implication. I think that in a contract of service the court must imply such a stipulation as I have mentioned, because it is a thing which must necessarily have been in view of both parties when they entered into the contract. …

In *Merryweather v Moore* [1892] 2 Ch 518, upon completing a term of apprenticeship with the plaintiffs, a firm of engine-makers, the defendant was refrained in their employment as a paid clerk, but he ultimately left their service for that of another firm of engine-makers. Two days before leaving the plaintiff's service, he compiled for his own purpose-and without their knowledge or consent — a table of dimensions of various types of engines made by them, and this table he had in his possession when he entered the service of his new employers, who subsequently exposed for sale an engine, it was said, of dimensions corresponding to dimensions given in the table, though this was denied. The court held that in compiling and retaining the table for his own purposes, the defendant had committed an abuse of the confidence ordinarily existing between a clerk and his employer, or a breach of the implied contract apparently arising from that confidence; the confidence being that a servant shall not use, expect for the purposes of services, the opportunities which that service gives him of gaining information; and accordingly that the plaintiffs were entitled to an interim injunction restraining the defendant from publishing or communicating the table or its contents to any person.

It is not difficult to see that this court has the jurisdiction to put right any violation of any right whether arising out of a breach of contract or of confidence. In fact, the confidence reposed postulated an implied contract. Therefore, where the court finds that there is in existence a confidential relationship between two parties, the court can infer an implied contract arising out of that confidential relationship.

[11] It is not in dispute that the defendant in our present case was an employee of the plaintiff having been appointed as the manager of the Engineering and Project Services Department of the plaintiff's factory in Pasir Gudang through the letter of appointment of 17 February 2005. Just like everyone of the defendants in *Worldwide Rota Dies; Schmidt Scientific Sdn Bhd v Ong Han Suan;* and *Robb v Green*, he owed a duty of fidelity to his employer. In fact, the letter of appointment of 17 February 2005, which is the contract of employment of the defendant, by the confidentiality clause set out above, imposed an express duty of fidelity on the defendant. It prohibited the defendant from divulging confidential information to others. It also restrains the defendant from making use of the plaintiff's confidential information for his own benefit. In my judgment, this express duty of fidelity imposed by the letter of appointment is over and above his implied duty to act towards his employer in good faith.

[12] The answer to this issue therefore was in the affirmative. I found and

held that the confidentiality clause created a duty of good faith, fidelity and confidence that prohibited the defendant from disclosing or using the plaintiff's confidential technology, information or trade secrets for his own benefit.

WHETHER THE PLAINTIFF POSSESSED INFORMATION OF TECHNOLOGY THAT IS CONFIDENTIAL IN NATURE AND OTHER TRADE SECRETS

The case for the plaintiff

[13] It is the plaintiff's case that it had developed a novel and confidential technology of using SBE as fuel to produce energy and steam in a specially designed SBE Bio Mass Boiler or NEF. In addition, the plaintiff has a trade secret in the form of the confidential information on the cost, benefits, pricing, cost saving benefits, specific requirements of the specially designed SBE Bio Mass Boiler and the names of the plaintiff's SBE suppliers and customers.

The evidence for the plaintiff

[14] In support of its case, the plaintiff proffered evidence through PW6, PW7, and PW4. Mr Mahandheran Muthu Krishnan ('PW6') is the senior manager of the plaintiff's Human Resource and Administration Department based at the plaintiff's plant at Pasir Gudang. He gave evidence that the plaintiff company had confidential information and technology or trade secrets that required protection. Firstly, the plaintiff company is one of the pioneer companies involved in recycling SBE to produce or generate IGPO which is used as base oil for the animal feed industry and as lubricants in the steel mill industries. He said that the plaintiff had developed a novel technology of processing SBE whereby the extracted SBE is used as fuel in the custom made NEF or boiler to generate steam and energy to run the plaintiff's factory at minimal cost. According to him, other than the plaintiff no other company in Malaysia knew or was using such technology. Secondly, the plaintiff's custom made specifications of the boiler used to burn the SBE are confidential information and trade secrets. The plaintiff had to acquire a special custom made boiler from THERMAX (India). Thirdly, information relating to the plaintiff's business of recycling the SBE to produce or generate IGPO is confidential and constitutes trade secret. Fourthly, the names of the plaintiff's suppliers of raw materials like SBE, the plaintiff's vendors and customers are deemed confidential information of the plaintiff. The names of the plaintiff's suppliers of SBE are IOI Loaders Croklan Sdn Bhd, Felda Vegetable Oil Products Sdn Bhd and Kempas Edible Oils Sdn Bhd, Kuala Lumpur Kepong, Mewah Oleo Industries.

[15] With regard the defendant, he said that his functions comprised of firstly, engineering and maintenance functions which amongst others include the maintenance of the boiler used to burn the SBE to run the plaintiff's production. Secondly, the defendant was also responsible to manage the purchasing of engineering items, to develop new/existing vendors and to identify slow/non moving items, to manage the plaintiff's inventory and execute assigned projects. He said that the defendant's scope of works as the manager of the project and engineering services gave him complete access to the plaintiff's confidential information and trade secrets.

[16] Siti Nor Hachimah ('PW7') is the plant manager of the plaintiff at its facilities at Pasir Gudang, Johor. She is a professional engineer with a degree in Chemical Engineering from Lamar University, USA. She has worked for the plaintiff since September 1990 and she looks after the plant's operation, laboratory and HSE. She explained in terms set out above what SBE is and described how it is subject to a process of recycling to produce oil ie IGPO. The remaining solids from the process is known as deoiled bleaching earth (DOBE) part of which is used as fuel in the NEF or boiler to generate steam and energy to run the plaintiff's production at its factory. According to PW7 to produce steam and energy, the DOBE cannot be burnt in a normal conventional boiler. As such, the plaintiff had to acquire a specially designed and custom made mass boiler with special fuel characteristic and inbuilt safety and environment control features. PW7 added that SBE that has not gone through the process of oil extraction can also be fed directly into the boiler and burnt. For that purpose, all that is needed is to take extra precaution and some modification with the pipe and fine tuning of the operation's parameters. The plaintiff's boiler was built in 1998 by the Indian boiler makers, Thermax, India, based on the plaintiff's design and special specification after years of research and development. The plaintiff's plant in Pasir Gudang is the only plant which have developed this novel technology and the only plant to have this specially designed SBE mass boiler. No other company is known to have used or developed this technology.

[17] PW6 also gave evidence that the plaintiff's technology or process of using SBE in the boiler as fuel to generate steam and energy, including information relating to the plaintiff's business of recycling waste, information relating to the boiler, the plaintiff's list of suppliers, vendors and clients are confidential information or trade secrets belonging to the plaintiff and are prohibited from being used or disclosed to the third parties. In addition they are covered by the confidentiality clause in her letter of employment. This is the same confidentiality clause as that contained in the defendant's letter of appointment. The defendant, she said, was head of engineering services and the boiler department. Thus, he had access to the plaintiff's plant documents and

familiar with the detailed process of the boiler operation. As well, the defendant had access to the suppliers of the plaintiff' SBE.

[18] The evidence of PW6 and PW7 that only the plaintiff possessed this technology of using SBE in the boiler as fuel to generate steam and energy is corroborated by PW4, the general manager of IOI Edible Oils Sdn Bhd, a subsidiary of IOI Corporation Sdn Bhd. He is based in Sandakan. He gave unchallenged evidence that the Department of Environment ('DOE'), to avoid accumulation of landfills, had directed all palm oil or vegetable refineries in West Malaysia to send all their discarded SBE to the plaintiff's factory in Pasir Gudang. The directive from DOE followed from the fact that the plaintiff's factory is the only one in Malaysia that is known to have the technology of utilising the SBE or discarded organic solid waste as fuel to produce steam and energy. The relevant evidence of PW4 on this is reproduced below.

> (NOP vol 2 at p 285)
>
> (PW4 (Examination-in-Chief)
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> NB Sudhakaran ('PW4'): … That they have actually provided the technology … Of course I'd asked him … I know for a fact that EcoOils is, was the only factory in West Malaysia who had this technology. And that's common knowledge among all refine, refineries managers. The reason being …
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> T Prem Anand: Which technology are you talking about?
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> NB Sudhakaran ('PW4'): Uh, using spent bleaching earth. To extract oil from spent bleaching earth and also to process it. What happens is that … it is a waste from the factory and the Department of Environment mandates that all refineries send their spent bleaching earth to this particular factory. Whereas in Sabah where I'm located, that is not the case, because there is no one to process these spent bleaching earth and therefore we have a waiver from the Department of Environment to actually dump the, or landfill the spent bleaching earth anywhere suitable.
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> T Prem Anand: So in West Malaysia, all the refineries will have to send their spent bleaching earth, which is recycled waste, palm oil waste, to the Plaintiff's …
>
> NB Sudhakaran ('PW4'): Factory.

The case for the defendant

[19] It was firstly submitted for the defendant that the plaintiff did not adduce any independent evidence to support its case and that the plaintiff's entire case rested on PW7. However, PW7 was not an independent or a truthful witness. Furthermore, she was not an expert witness and her evidence does not meet the requirements of expert evidence under s 45 of the Evidence Act 1950. Thus her evidence had failed to establish the uniqueness or novel technology that the plaintiff's had purportedly developed.

[20] Secondly, PW6 had admitted that the plaintiff's novel technology is not protected by any copyright or patent, thus, it cannot be unique or original. Furthermore, the SBE boiler is not the plaintiff's invention because the said equipment has been in the market in India for many years with sales in the thousands in the global market.

The findings of the court

[21] I found that nothing turns on the allegation in the statement of defence that the SBE boiler is not the plaintiff's invention and that it has been in the market in India for many years with sales in the thousands in the global market. This is because the defendant did not adduce evidence to establish that others have the technology or have the specially designed NEF. Moreover, there was no evidence adduced of the existence of such NEF in the market in India with sales in the thousands in the global market.

[22] As regards the argument that the plaintiff had failed to prove that its technology is unique or novel, in my judgment, this is beside the point. The plaintiff's cause of action is premised on breach of the confidentiality clause or breach of confidence. Thus, the issue was not whether the information of technology of the plaintiff that is sought to be protected is unique or novel, but whether it is a trade secret or confidential information. There are numerous case authorities that drive home this point. In *Worldwide Rota Dies*, Abdul Malik Ishak J considered the point and the case law and held as follows:

> [75] A whole gamut of confidential information in the possession of an employee has been protected. In determining whether such information can be regarded as confidential, it has been held that 'what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process' (*Saltman Engineering Co, Ltd And Others v Campbell Engineering Co, Ltd* [1963] 3 All ER 413 at p 415 (CA), per Lord Greene MR). So when the recipient makes use of the information, the recipient avoids doing the work notwithstanding that the recipient is capable of doing it.

[23] RK Nathan JC, as he then was, had this to say in *Schmidt Scientific*, at pp 692–693:

> In *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 Megarry J held that in order to succeed in an action for breach of confidence the plaintiff must establish to the satisfaction of the court three elements, namely,
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> (1) that the information which the plaintiff is seeking to protect is of a confidential nature;
>
> (2) that the information in question was communicated in circumstances importing an obligation of confidence; and

(3) that there must be an unauthorised use of that information to the detriment of the party communicating it.

A little later His Lordship said at p 696 of the report:

> It is my judgment that trade secrets are not limited to manufacturing processes or secret formulae but extend to information relating to the list of names and addresses of the customers and suppliers, specific questions sent to the customers, costs prices, specific needs and requirements of the customers and status of the ongoing negotiation with the customers.

[24] Vincent Ng J (later JCA) in *Svenson Hair Center Sdn Bhd v Irene Chin Zee Ling* [2008] 7 MLJ 903 at pp 913–916; [2008] 8 CLJ 386, at pp 397–399, explained the law and made the following observations:

> In my judgment, the confidentiality of the said confidential information (which includes customer lists and details) could not be seriously disputed as this has been expressly mentioned in cl 7.01(ii) of the employment agreement (supra). And, it must be recognised that particulars such as customer's names, lists and details have also been judicially recognised as being confidential in nature, and wrongful utilisation of such particulars warrants injunctive protection. Some cases on point are *Faccenda Chicken Ltd v Fowler and Others CA* [1986] 1 All ER 617*('Faccenda Chicken')*, *Thomas Marshall (Exports) Ltd v Guinle* [1978] 3 All ER 193*('Thomas Marshall')*. In *Schmidt Scientific Sdn Bhd v Ong Han Suan & Ors* [1998] 1 CLJ 685 even the 'list of names and address of customers and suppliers' were classified as trade secrets. …
>
> The law of confidentiality in the context of relationship between employer and employee, and of restrictive covenants has been set out in *Faccenda Chicken* as follows:
>
> (1) Where the parties are, or have been, linked by a contract of employment, the obligations of the employee are to be determined by the contract between him and his employer: cf *Vokes Ltd v Header* [1945] 62 RPC 135 at p 141.
>
> (2) In the absence of any express term, the obligations of the employee in respect of the use and disclosure of information are the subject of implied terms.
>
> (3) While the employee remains in the employment of the employer the obligations are included in the implied term which imposes a duty of good faith or fidelity on the employee. …
>
> (4) The implied term which imposes an obligation on the employee as to his conduct after the determination of the employment is more restricted in its scope than that which imposes general duty of good faith. It is clear that the obligation not to use or disclose information may cover secret processes of manufacture such as chemical formulae (see *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239), or designs or special methods of construction (see *Reid Sigrist Ltd v Moss Mechanism* [1932] 49 RPC

461), and other information which is of a sufficiently high degree of confidentiality as to amount to a trade secret.

(5) In order to determine whether any particular item of information falls within the implied term so as to prevent its use or disclosure by an employee after his employment has ceased, it is necessary to consider all the circumstances of the case. We are satisfied that the following matters are among those to which attention must be paid, (a) The nature of the employment. Thus employment in a capacity where 'confidential' material is habitually handled may impose a high obligation of confidentiality because the employee can be expected to realise its sensitive nature to a greater extent than if he were employed in a capacity where such material reaches him only occasionally or incidentally, (b) The nature of the information itself. In our judgment the information will only be protected if it can properly be classed as a trade secret or as material which, while not properly described as a trade secret, is in all the circumstances of such a highly confidential nature as to require the same protection as a trade secret … The restrictive covenant cases demonstrate that a covenant will not be upheld on the basis of the status of the information which might be disclosed by the former employee if he is not restrained unless it can be regarded as a trade secret or the equivalent of a trade secret: see for example *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at p 710; [1916-17] All ER Rep 305 at p 317 per Lord Parker and *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 at p 1037; [1977] 1 WLR 1472 at p 1484 per Megaw LJ.

[25] From the evidence adduced, I similarly found and held that the plaintiff had proved on balance of probabilities that its technology of using SBE as fuel to produce energy and steam in a specially designed SBE Bio Mass Boiler is highly confidential information and a trade secret. This was the more so considering that the defendant as manager of the project & engineering services of the plaintiff was employed in a capacity where 'confidential' material is habitually handled. In addition, the plaintiff has a trade secret in the form of the confidential information on the cost, benefits, pricing, cost saving benefits, specific requirements of the specially designed SBE Bio Mass Boiler and the names of the plaintiff's SBE suppliers and customers. Thus, I found and held that the plaintiff had proved on balance the first element spoken of in *Coco v AN Clark (Engineers) Ltd (No 2)* [1969] RPC 41, for an action for breach of confidence, namely, that the information which the plaintiff sought to protect is of a confidential nature.

DID THE DEFENDANT HAVE ACCESS TO THE INFORMATION OF THE CONFIDENTIAL TECHNOLOGY AND TRADE SECRETS DURING HIS EMPLOYMENT WITH THE PLAINTIFF?

[26] As mentioned earlier, both PW6 and PW7 gave clear evidence that the

defendant's scope of work and job function gave him full access to the plaintiff's technology in particular on the use of SBE as fuel to produce energy and steam and to the technical specifications of the SBE Mass boiler. They also testified that the defendant had access to the names of the suppliers of plaintiff's SBE, the plaintiff's vendors and customers. PW6 in particular gave evidence that the scope of work of the defendant as the manager of the plaintiff's department for project and engineering services gave the defendant complete access to the following:

(a) the confidential names of the plaintiff's suppliers of raw material and SBE including the names of vendors, suppliers and customers;

(b) as maintenance engineer of the plaintiff's NEF/boiler, complete access to confidential information relating to the specially made boiler; and

(c) information on the processes involved in using SBE as fuel in the NEF.

[27] In my judgement, they were justified in their evidence on this for the defendant himself ('as DW2') gave evidence that corroborated what they said. Under cross-examination the defendant admitted being in charge of maintaining the SBE Boiler or NEF at the plaintiff's factory during his employment with the plaintiff and that he was aware that the plaintiff was dealing in SBE.

Cross-Examination of DW2 (p 799 of vol 3 of notes of proceedings)

> KR Raghunath (DW2): In brief, my scope was maintenance of all the machineries in the factory and also to do projects, means all projects, modification projects within the factory limits. These are main two project activities. And maintaining all the equipments and machineries in the plant, and to buy all raw materials, sorry, spare parts required for the maintenance of the machineries. And also the transport facility of the company which … had lorries and tractors. So to maintain that also.
>
> T Prem Anand: Were you in charge of maintaining the Plaintiff's boilers?
>
> KR Raghunath (DW2): It covers all the machineries in the factory.
>
> T Prem Anand: So, yes, you were in charge.
>
> KR Raghunath (DW2): Yes. Yes.

(At p 801 of vol 3 of notes of proceedings)

> T Prem Anand: The boiler. Are you in charge of, are you responsible to maintain the boiler …
>
> KR Raghunath (DW2): Yes, sir. That is the one and only boiler in the factory that was burning DOBE. I was in charge of machineries, all machineries that includes boiler also. Yes.

(At pp 802–803 of vol 3 of notes of proceedings)

> T Prem Anand: So, you are not aware that the Plaintiff has a contract with the state government for the spent bleaching earth to be supplied to the Plaintiff. Because … are you not aware of it that the Plaintiff collects spent bleaching earth?
>
> KR Raghunath (DW2): I am aware Plaintiff collects spent bleaching earth. I am not …
>
> T Prem Anand: Are you aware? I just want you to say Yes or No. Are you aware they collect spent bleaching earth?
>
> KR Raghunath (DW2): Yes, I am aware.
>
> T Prem Anand: So, you are aware of spent bleaching earth's ingredients?
>
> KR Raghunath (DW2): Of course, I'm aware.
>
> T Prem Anand: You said there was only one boiler in the Plaintiff's factory.
>
> KR Raghunath (DW2): Yes.
>
> T Prem Anand: That boiler is also known as an NFE, is it?
>
> KR Raghunath (DW2): That they call NF- NEF, Non-electric Furnace …

[28] Further to the above the defendant had also admitted in examination-in-chief that part of his duties required him to visit the plaintiff's customers/suppliers to ascertain the transport requirements for the collection of spent bleaching earth.

(At p 726 vol 3 notes of proceedings)

> KR Raghunath (DW2): Part of my duties requires me to visit the Plaintiff's customers to ascertain the transport requirements for the collection of spent bleaching earth. I was given the task of replacing the old transport system used by the Plaintiff.

[29] From the evidence referred to above, in my view, there could be no denying, that the defendant had access to the information of the confidential technology and trade secrets of the plaintiff during his employment with the plaintiff.

WHETHER THE DEFENDANT HAD USED, DISCLOSED, DIVULGED AND DISSEMINATED THE PLAINTIFF'S CONFIDENTIAL TECHNOLOGY INFORMATION AND OTHER TRADE SECRETS THEREBY BREACHING THE TERMS OF THE CONFIDENTIALITY CLAUSE

[30] It was the case for the plaintiff that:

(a) the defendant had misused and disclosed to PW4 and IOI Edible Oils

Sdn Bhd confidential information on the costs, benefits, pricing, cost saving benefits, specific requirements of the specially designed Bio Mass Boiler;

(b) the defendant had misused and disclosed to IOI Edible Oils Sdn Bhd and Felda Vegetable Oil Sdn Bhd the technology relating to the Bio Mass Boiler which is specially designed by the plaintiff to burn SBE; and

(c) the defendant had established KIS while he was employed with the plaintiff to disclose and disseminate the plaintiff's technology while establishing his business at the same time.

Misuse and disclosure of the plaintiff's technology relating to the SBE Mass Boiler to Felda Vegetable Oil Sdn Bhd

[31] PW6 gave evidence that he received complaints that the defendant was disclosing the plaintiff's technologies to IOI Edible Oils Sdn Bhd and Felda Vegetable Oil Products Sdn Bhd for personal gain. During a working visit to meet one of the plaintiff's suppliers namely, Felda Vegetable Oil Products Sdn Bhd ('Felda') on 17 October 2006, PW6 was informed by one Mr Chen Kin Woo ('PW5') that the defendant had met him and had passed his business card under a company known as 'KIS' Knowledge Integration Services. Felda by a letter of 26 June 2007 (exh P24) to the plaintiff confirmed the defendant's visit to Felda on 27 September 2006 and enclosed a photocopy of the defendant's business card (exh P24a–c) that was given to PW5. The business card indicated that the defendant belonged to a company in India known as Knowledge Integration Services (India) Pvt Ltd which also had a representative office in Singapore, whereby the defendant carried the title of senior consultant for industrial solutions.

[32] PW5, the general manager of Felda during the period 2006–2007, confirmed that Felda was a supplier of SBE to the plaintiff. He also confirmed signing the letter of 26 June 2007 (P24) in which he stated that Mr KR Raghunath of Knowledge Integration Services had visited Felda on 27 September 2006 and left his name card ie exh P24(a–c). He explained that Mr Ragunath visited them at their head office in Kuala Lumpur and there was a short briefing and discussion on the use of SBE as a fuel. He could not remember the person that actually gave the presentation. PW5 was not cross-examined on his evidence.

[33] Learned counsel poured cold water on the evidence of PW5 saying that he did not identify the defendant as the person that he met and gave him the name card despite the fact that the defendant was seated in court when he was testifying. Furthermore, no attempt was made by the plaintiff's counsel to ask

PW5 to identify the defendant as the person he met on 17 October 2006. In any event, PW5 could not remember the person that gave the presentation.

[34] To my mind, there was nothing to this attempt by the defendant to cast doubt on the identity of the defendant as the person that met PW5 on 17 October 2006. In the first place, the defence declined to cross-examine PW5. His evidence that he wrote the letter of 26 June 2007 in response to a request from the plaintiff with regard the visit of the defendant to Felda remained unchallenged. Also, his evidence that Mr R Raghunath of Knowledge Integration Services had visited Felda on 17 October 2006 and during that visit there was a short presentation and discussion of the use of SBE as fuel, stood unchallenged. It must be taken as accepted. In addition, PW5's evidence that this Mr KR Raghunath was from Knowledge Integration Services and the evidence of the business card ie P24a–c that he received from Mr KR Raghunath as belonging to a company in India known as Knowledge Integration Services (India) Pvt Ltd which also had a representative office in Singapore, whereby he carried the title of senior consultant for industrial solutions, was not challenged or disputed. The evidence on this must also be taken as accepted by the defendant. We then had the defendant (as DW2) under cross-examination admitting that he in fact was managing director and a shareholder of Knowledge Integration Services India Pte Ltd also known as KIS that was established in India on 28 September 2006. He went on to admit that he is a shareholder of Knowledge Integration Services Singapore that was established on 15 September 2007.

[35] The relevant evidence of the defendant under cross-examination is reproduced below:

(pp 812–816 NOP vol 3)

T Prem Anand: Mr Raghunath …

KR Raghunath (DW2): Yes.

T Prem Anand: Where are you working now?

KR Raghunath (DW2): Now I am working for the Knowledge Integration Services, group of companies.

T Prem Anand: Knowledge Integration Services also known as KIS?

KR Raghunath (DW2): Ya, KIS, is, is, is the logo of the company, K-l-S.

T Prem Anand: What is your position in Knowledge Integration Services?

KR Raghunath (DW2): Current designation is Managing Director.

T Prem Anand: Are you a shareholder of KIS …

KR Raghunath (DW2): Yes.

…

T Prem Anand: Can you tell the court when Knowledge Integration Services was established?

KR Raghunath (DW2): If I remembered correctly was established in 2005 as a proprietary firm, and then later incorporated in 2006, as a private- as a private integrated company, like a Sendirian Berhentian.

…

T Prem Anand: … can you please refer to pages 154 and 155 of Bundle D?

…

Now this is the Memorandum of Association and Articles of Association of Knowledge Integration Services India Pte Ltd, right?

…

T Prem Anand: Am I right?

KR Raghunath (DW2): Yes, sir.

T Prem Anand: You look at 155.

KR Raghunath (DW2): Yeah.

T Prem Anand: It refers to the Certificate of Incorporation …

KR Raghunath (DW2): Yeah.

T Prem Anand: … date of establishment. It says at the second paragraph, 'given under my hand at Bangalore, this 28 th day of September 2006 …'

KR Raghunath (DW2): Yeah.

T Prem Anand: Is this the date it was incorporated?

KR Raghunath (DW2): Yes, is the date that was incorporated …

…

T Prem Anand: Mr Raghunath … 28th September 2006, was it during your employment with the Plaintiff?

KR Raghunath (DW2): I was, with the, employed with Eco Oils, yes.

T Prem Anand: So when, when Knowledge Integration Services was established, you were working with the Plaintiff, yes or no?

KR Raghunath (DW2): Yes, definitely.

…

T Prem Anand: Did you, are you also aware of KIS, sorry, Knowledge Integration Services Malaysia and also Knowledge Integration Services Singapore?

KR Raghunath (DW2): You asking me?

T Prem Anand: Yes.

KR Raghunath (DW2): Yes, sir, I am aware of both the things, yeah.

T Prem Anand: I refer you to page 17 of Bundle B.

KR Raghunath (DW2): Yes, sir.

T Prem Anand: Mr Raghunath, is this part of Knowledge Integration Services India as well, this Knowledge Integration Services Malaysia?

KR Raghunath (DW2): Yes, it is part of KIS India also.

T Prem Anand: And can you tell the court when it was established?

KR Raghunath (DW2): The established date was, 23/9/2010.

T Prem Anand: Mr Raghunath, we need to page 148 of Bundle B.

KR Raghunath (DW2): Yes, sir.

T Prem Anand: Am I right to say this is the business information of Knowledge Integration Services Singapore Pte Ltd?

KR Raghunath (DW2): 148, yes, the information, yes.

T Prem Anand: Can you tell the court when was this company established?

KR Raghunath (DW2): It was, incorporation date is 15/9/2007.

…

KR Raghunath (DW2): Yes, 15th September 2007, yeah.

T Prem Anand: Are you a shareholder of Knowledge Integration Services Singapore?

KR Raghunath (DW2): Yes.

T Prem Anand: Mr Raghunath, can I put it to you that …

KR Raghunath (DW2): Yes.

T Prem Anand: … Knowledge Integration Services India, Knowledge Integration Services Singapore, Knowledge Integration Services Malaysia, was all established after you joined the Plaintiff?

KR Raghunath (DW2): The dates?

T Prem Anand: Yes.

KR Raghunath (DW2): After left also, this is formed after left EcoOils, please after left …

T Prem Anand: No, I am asking you, when you, after you joined the Plaintiff …

KR Raghunath (DW2): Yes.

T Prem Anand: … then KIS India was established, KIS Singapore was established, KIS Malaysia was established in … date was …

KR Raghunath (DW2): In, in sequences …

T Prem Anand: Yes.

KR Raghunath (DW2): … the dates are …

T Prem Anand: Yes.

KR Raghunath (DW2): … after I left EcoOils.

T Prem Anand: Yes, yes.

KR Raghunath (DW2): The dates are after I left EcoOils, not when I was in employment.

After I left EcoOils.

T Prem Anand: I refer you to page 181 for Bundle B.

KR Raghunath (DW2): Yes, sir.

T Prem Anand: Am I right to say this is an expatriate identification?

KR Raghunath (DW2): Yes, sir.

T Prem Anand: Issued by the Immigration of Malaysia?

KR Raghunath (DW2): Yes, sir.

T Prem Anand: Now, if you look at the date of issue here, it says 21st November 2007.

KR Raghunath (DW2): Yeah.

T Prem Anand: Employer, Knowledge Integration. Now, you have also given an employer's address, Number 3, Jalan Wang-Wangi 1/3, Kawasan Perindustrian Desa Plentong, Masai, Johor Bahru 81700, Johor Telur Tasik.

KR Raghunath (DW2): Yes, what is the question?

T Prem Anand: The question is, is this part of Knowledge Integration Malaysia?

KR Raghunath (DW2): Knowledge Integration Malaysia is a branch office or representative office of India, KIS India, rep office, representative office of KIS India, was established in Malaysia, it is a representative office of KIS India. It is not a incorporation of company, only branch office.

T Prem Anand: So it a branch office of KIS India.

KR Raghunath (DW2): You cannot say exactly branch, but is repress …representative office, the right word is representative office.

T Prem Anand: So based on the employment pass you are working for an Indian company?

KR Raghunath (DW2): Yes, definitely.

[36] At the risk of being trite, there is no denying that the defendant's name is Raghunath Ramaih Kandikeri. The name stated on the business card

P24(a–c) is KR Raghunath. In my judgement, the admission of the defendant that he was in fact managing director and a shareholder of Knowledge Integration Services India Pte Ltd also known as KIS and that he was associated with Knowledge Integration Services Singapore both of which are mentioned in P24(a–c), and the circumstances under which the letter P24 was written, irresistibly pointed to one and only inference, that is, that the person that had attended at Felda's head office in Kuala Lumpur on 17 October 2006 and given the short briefing and held a discussion on the use of SBE as fuel and then given P24(a–c) to PW5 was none other than the defendant himself. I therefore found and held that the plaintiff had proved on balance of probabilities that the defendant had disclosed confidential information of the plaintiff's technology on the use of SBE as fuel to Felda Vegetable Oil Products Sdn Bhd whilst he was still in the employment of the plaintiff.

Disclosure and misuse of the plaintiff's technology relating to the SBE Bio Mass Boiler and confidential information on its benefits, pricing, cost saving benefits, and specific requirements to PW4 and IOI Edible Oils Sdn Bhd

[37] For this, the plaintiff relied on the evidence of NB Sudhakaran ('PW4') and the expert evidence on the forensic examination of the computer used by the defendant whilst under the employment of the plaintiff. PW4 since 2003 was and still is, the general manager of IOI Edible Oils Sdn Bhd ('IOI Edible'). He said he had met with and knew the defendant whom he identified in open court from the witness stand. According to him, the defendant came to see him in Sandakan, Sabah at his factory sometime at the end of 2006 regarding a technology that he might be interested in. A little later he said he had met the defendant many times in Sandakan. He added that the occasion and the time he had met the defendant in Sandakan was 'roughly end of 2006 and into 2007'. The technology the defendant spoke of was the use of SBE to be burnt as fuel in a boiler to produce steam or energy which could be used to run IOI Edible's refineries. Instead of throwing away the waste, IOI Edible could actually generate value out of it. At that meeting, the defendant came with one Subramaniam a/l Karuppiah and he claimed to be a consultant working for Knowledge Integration Services of India. The defendant also claimed that his company Knowledge Integration provided the technology using SBE as fuel to generate steam and energy to the plaintiff. PW4 said he had inquired from the defendant about his claim as he knew for a fact that Ecooils was the only factory in West Malaysia that had this technology to extract oil from SBE and also to burn the residual oil after the extraction in the boiler. He said this was common knowledge among all refinery managers and it is for this reason that the Department of Environment mandates that all refineries in West Malaysia send their SBE to the plaintiff's factory. Whereas, in Sabah as there is no one to process SBE, there is a waiver from DOE to actually dump or landfill it anywhere suitable. In addition, the defendant told him that SBE can be burnt

directly in the boiler without actually going through the extraction process. And this is what he was trying to push to him. Knowing that Ecooils being the only one in West Malaysia to have this technology, PW4 was a little concerned that it could be proprietary technology. As such he asked the defendant about it to which he replied, 'no problem, we are the ones who had actually worked with the Ecooils on this technology and we have a non-disclosure agreement which has expired and therefore we, I'm now free to sell it anywhere provided it is not in West Malaysia'.

[38] PW4 further testified the defendant had invited him to visit the plaintiff's factory at Pasir Gudang, Johor to view the highly confidential SBE Bio Mass boiler of the plaintiff. He eventually made the visit to the plaintiff's factory in Pasir Gudang on the Sunday of 11 March 2007 where he was met by the defendant who took him to view the boiler. The date of the visit to the factory was confirmed by a notation he made in his diary and the evidence of the claims he made for transportation expenses for the visit marked as exhs P9 and P10. These documents were produced by PW4 upon a request by learned counsel for the defendant of him whilst under cross-examination to produce them. Whilst he was at the factory of the plaintiff, he saw the boiler under the guidance of the defendant, and saw that it operated properly on SBE. His evidence on the visit by the defendant to Sandakan and his own subsequent visit to the plaintiff's plant at Pasir Gudang is as follows:

(NOP at pp 278–296 of transcript of NOP for 25 February 2011 (vol 2))

T Prem Anand: Did you visit the factory in Pasir Gudang?

NB Sudhakaran (PW4): Yes, I did.

T Prem Anand: Was the Plaintiff there, I'm sorry, was the Defendant there when you visited the factory?

NB Sudhakaran (PW4): He took me … into the factory.

T Prem Anand: So, can you please explain to the court what happen when you visited the factory?

NB Sudhakaran (PW4): … he had told me that he had made the arrangement for me to visit the factory. … and … on several occasions, asking me to, fly down to JB, but … you know, I have been very busy, and … I couldn't, and I had told him that there was a weekend which I was going home, and I would only be free on Sunday, and whether it would be alright. He said he had already made the arrangements, and on that day we went to, I went down to Pasir Gudang, he … met me and … he took me to the factory and as we walked in … I noticed that, … you know, there was no problem getting in, because nothing, no gate pass to be issued and so on, because, that means that people there are very familiar with him and, and uh, so obviously I thought that he, he'd got all the clearance. So we walked in and we went into the boiler site and … we looked at the boiler. Of course, I was interested to see um, uh, what the boiler was all about, how it

operated, and whether it was true that, ya, it operated properly on a spent bleaching earth. … and how the system functioned.

…

NB Sudhakaran (PW4): Yes. Um, all under the guidance of Mr Raghu.

T Prem Anand: Mr Raghu. And this factory that you're talking about is the Plaintiff's factory?

NB Sudhakaran (PW4): Yes it was EcoOils …

T Prem Anand: EcoOils Sdn Bhd?

NB Sudhakaran (PW4): … Sdn Bhd.

T Prem Anand: And the boiler in that factory also belongs to EcoOils Sdn Bhd?

NB Sudhakaran (PW4): I'm, naturally assume that anything inside there would be, belongs to EcoOils.

T Prem Anand: Ok. Did you, ask Mr Raghunath uh about, whether he had the permission of the Plaintiff to take in you into to see the boiler?

NB Sudhakaran (PW4): In fact, that was one of the things that I … was worried about and I asked him, you know, two things, number one whether he had actually got permission for someone from outside to go in, to go into their plant to visit and secondly, that, it would be on a Sunday Because … it is not, it is not exactly normal for someone to do that, huh. But the, he said he had already explained to the, to the people at the EcoOils that the, you know, I, I could not find any other time to, to come and, you know, whether it was ok. And he had mentioned that he had got the clearance. And uh, therefore, from the mannerism of the people there, who had actually more or less welcomed him inside the factory, being a consultant who is not a staff or member of the factory, I assumed that everything was in order.

…

T Prem Anand: Mr Sudha, you said … when the Defendant had met you in Sandakan, Sabah, right?

NB Sudhakaran (PW4): Yes.

T Prem Anand: At your factory in Sandakan, Sabah at the end of 2006?

NB Sudhakaran (PW4): Yes.

T Prem Anand: December 2006. Uh, he had.

NB Sudhakaran (PW4): Sorry, I did not say December.

T Prem Anand: You said that.

NB Sudhakaran (PW4): I said it could be towards the end of the year.

T Prem Anand: Ok. Ok. When he visited you in Sandakan, Sabah, uh, he claimed he was the consultant of Knowledge Integration Services.

NB Sudhakaran (PW4): Correct.

T Prem Anand: Is that what he said?

NB Sudhakaran (PW4): That's right.

T Prem Anand: Did he say anything about his relationship with the Plaintiff?

NB Sudhakaran (PW4): Yes. He mentioned that the, he was involved in the providing technology to the Plaintiff. His company rather. …

T Prem Anand: His company means which company?

NB Sudhakaran (PW4): Knowledge Integration. That they have actually provided the technology and uh that. Of course I'd asked him, um, I know for a fact that EcoOils is, was the only factory in West Malaysia who had this technology. And that's common knowledge among all refine, refineries managers. The reason being …

T Prem Anand: Which technology are you talking about?

NB Sudhakaran (PW4): Uh, using spent bleaching earth. To extract oil from spent bleaching earth and also to process it.

…

NB Sudhakaran (PW4): Exactly. So, there are 2 parts to this technology. One is to extract oil, uh from the spent bleaching earth. The other one is to burn … the residual oil after the extraction in these boiler. Ok. So, it's a second process. You can, according to Mr Raghu, you can also use it to burn … this spent bleaching earth directly in the boiler without actually going through the extraction process. And this is what he was trying to … push to us. … So, when I ask him, about this, that, you know, EcoOils being the only one in West Malaysia to have this, I'm was of course a little concerned that, you know, that the, it could be proprietary technology. So, I asked him about it. So, he says 'no problem, we are the ones who had actually worked with the EcoOils on this technology and we have a non-disclosure agreement which has expired and therefore we, I'm now free to sell it anywhere provided it is not in West Malaysia.' This is the, this is what I know. This is what I was told by Mr Raghu.

(pp 339–400 NOP vol 3) (Cross-examination of PW4)

K Ramesh: I'll take you the emails later ah? Now, you have stated in your testimony in the last day that you ah when you have visited the factory, the Plaintiff's factory in Pasir Gudang, ah it was on a Sunday right?

NB Sudhakaran (PW4): Yes.

K Ramesh: And ah you brought you diary to confirm the date that you visited Pasir Gudang factory?

NB Sudhakaran (PW4): Yes, I have.

K Ramesh: Can you ah show us where in the Bundle?

NB Sudhakaran (PW4): Oh, ah sorry, I brought the Diary only today. And ah I had no time actually to show it to the to-to either the counsel or anyone.

…

K Ramesh: Go through your diary and confirm the day of the visit.

NB Sudhakaran (PW4): (Flipping of documents)

Yes, it was on the 11th of March, 2007.

K Ramesh: Can I have side (SIC) of that particular hand diary?

NB Sudhakaran (PW4): Sure.

[39] PW4 also gave evidence that the defendant had sent him photographs of the plaintiff's SBE Bio Mass boiler located at the plaintiff's Pasir Gudang factory as attachments to an email dated 29 March 2007 from the defendant to him. PW4 on the prompting of counsel for the defendant had tendered as evidence the various photographs as exhs P8, P8 A–D, P8F (found at pp 4, 4A, 4B, 5A, 5B, 6A of *ikatan dokumen tambahan plaintif*). The evidence of PW4 on this is as follows:

(NOP at pp 278–296 of transcript of NOP for 25 February 2011 (vol 2))

T Prem Anand: … did the Defendant send you any photographs of the boilers?

NB Sudhakaran (PW4): Yes, he did. And uh that was after our visit to the factory. You see, I'm very careful not to take photos on my own. Because I would not allow it, normally, in my own factory. So, later on I asked him if you, if he had any, I would be happy to have it because then I would like to send it to my boss for him to, you know, as a report.

(NOP vol 3 at p 350)

(Evidence of PW4 under cross-examination)

K Ramesh: Now … where are the photographs? The last date you stated that … you were given … email photographs, is that in the Bundle?

NB Sudhakaran (PW4): Uhm … yeah, it is, in the Bundle

(Flipping of documents)

Ah … pages 5, 6 and 7.

[40] It is to be noted that PW4 confirmed in his evidence that the SBE Bio Mass boiler in the photographs forwarded by the defendant to him in P8, P8 A–D, P8F is similar and looked like the same SBE boiler that he saw at the plaintiff's factory in Pasir Gudang when he visited the factory on 11 March 2007.

T Prem Anand: Did … the Defendant, give you any other information relating to the um boiler, apart from showing you the photographs? And visit, letting you to visit the factory?

NB Sudhakaran (PW4): … Yes, he did some calculations to show uh the benefits that could be derived from carrying out this project.

T Prem Anand: Can you explain … to the Court what are the benefits that could be derived?

NB Sudhakaran (PW4): Essentially, … what we are doing is throwing waste into a landfill, and … instead of just dumping it at a cost, because it costs money …to transport it out and of course renting a piece of land. We would then actually use it to produce energy either … by way of steam or even electricity to run … part of … the requirement for our plant. … and then … after that it becomes a more … greener way of … doing landfills because there is no more oil left or hardly any oil left in the earth that would be landfilling. And of course the other benefit would be that whoever started with this boiler would … control the trade of … spent bleaching earth. Just as EcoOils does in West Malaysia. Because … the fact remains that …we in Sabah allowed to do landfilling is that there is no one who actually processes … this waste. And therefore the Department of Environment actually has given us a waiver to … you know from processing or treating it further other than doing just landfilling. So … other parties, other refineries would then have to sell their bleaching earth or even you know, pay for us to collect the … or rather if … we were to hold the … technology, we will be in a position to actually … charge them for … for disposal of their spent bleaching earth.

[41] Further, PW4 under cross-examination admitted that there were emails between him and the defendant including a working of the plaintiff's technology on the SBE boiler which was produced by the defendant to show the cost benefit and the cost of the capital outlay and benefits to be derived. The excerpts of the evidence of PW4 below bear this out:

(NOP vol 2 at pp 302–304)

(Cross-examination of PW4)

K Ramesh: Do you have any documentations from the company in relation to the negotiations? Like you know, your quotation and things like that? There has to be some formal documentations from the company in respect of this purchase of this boiler.

NB Sudhakaran (PW4): Actually … what I have is a working paper produced by Mr Raghu … to show the cost benefit which means the cost of the … capital outlay and the benefits that you derive from it.

K Ramesh: Right.

NB Sudhakaran (PW4): Ah … all these … was kept … sort of … informal because it was all exploratory.

A …

NB Sudhakaran (PW4): … We were not negotiating any price or anything, we were looking at the technology. We are evaluating the technology.

K Ramesh: Is there documentations to confirm that?

B NB Sudhakaran (PW4): Oh yes, the … emails would …

K Ramesh: Besides the email … Besides these three emails …

NB Sudhakaran (PW4): All our transactions in … documentation were through emails. There was nothing … by way of letter … or you know … legal document C anything like that. But I think emails are also documents.

[42] Thereafter, counsel for the defendant challenged and requested PW4 to produce emails, relevant documents and correspondences to prove the D communications between the defendant and PW4 or IOI Edible Oils. The excerpts of the evidence indicating this are reproduced below:

(NOP vol 2 at pp 304, 325–326)

E K Ramesh: Do you have any other documentations besides these three emails, that's what I am asking.

NB Sudhakaran (PW4): I don't think you captured all the emails that I have got that have been transacted between Knowledge Integration …

F K Ramesh: You have others?

NB Sudhakaran (PW4): Of course there are. There are many more I think. But … I do not know how many. I do not research it before I coming here, so I really cannot tell you how many but the photos definitely I have because … I was going to present it to my boss.

G …

K Ramesh: So there would be some official records in your office to confirm your visits to the Pasir Gudang Factory because … you say that the sale didn't get through.

H NB Sudhakaran (PW4): Yeah.

K Ramesh: So would there be any documentation to confirm …

NB Sudhakaran (PW4): Likely to be an email …

I K Ramesh: Pardon?

NB Sudhakaran (PW4): Likely to be an email.

K Ramesh: Likely to be an email?

NB Sudhakaran (PW4): Yes.

K Ramesh: Yang Arif … At this stage, since there are several things to be confirmed by this witness, I would request that the witness brings along the documents for continuance …

[43] Following from the above, PW4 produced various emails and working papers on the plaintiff's technology, cost saving benefits and confidential information relating to the plaintiff's business which were marked P11, P12, P13, P14, P15, P16, P17, P18, P19, P20, P21, P22 and P23. The evidence on this is as follows:

(NOP vol 2 at p 342)

K Ramesh: Now you had stated in your testimony, the last date that there was a working paper produced by Raghu in respect of the KIS's technology, did, is the working paper in the Bundle?

NB Sudhakaran (PW4): No, I think it … is an email. He has sent an email.

K Ramesh: Is the email in the Bundle?

NB Sudhakaran (PW4): Let … me check.

(Flipping of documents)

There was, there is one … on page 13, which explains… Prudential Savings,

(Flipping of documents)

And there is one more on page 8, to my boss.

(Flipping of documents)

(NOP vol 2 at p 413)

Re-examination of PW4

T Prem Anand: … Refering to your Page 8, … could you tell us a little bit about what was stated in … explaination of the technology by the Defendant?

NB Sudhakaran (PW4): It talks about potential of savings due to carbon credits in converting waste, spent bleaching earth to energy. … number one, waste spent bleaching earth is organic waste, when burning organic waste IOI will be avoiding the landfill and from the 30 tons of spent bleaching earth, IOI will get 6535 emission reductions for avoiding landfill of SBE. And then the second one is by burning SBE, IOI can generate energy. For generating energy using SBE, IOI will get around 7000 CERs. Considering total CER 13,500 in present rate of CER USD8.00 per CER, the revenue per year would be RM388,000 which is around 25% of project cost.

T Prem Anand: And then at page … 10, is it?

NB Sudhakaran (PW4): Page 13.

A …

Here basically it's talking about your potential of savings for the factory in Sabah and … the bottomline is at … waste SBE is approximately worth 3.1 million per year.

B

[44] In addition to the above, PW4 gave evidence that the defendant had given a slide show and presentation of the plaintiff's technology relating to the benefit of using SBE to IOI Edible Oils Sdn Bhd. The evidence is as follows:

C (NOP vol 2 at pp 423–424)

T Prem Anand: Did Mr Raghu, the Defendant make any presentation to, IOI Oils? You said there was presentation going. Was it a slide … presentation or any other form presentation?

D NB Sudhakaran (PW4): Yes. It was … a few slides to show the cost benefit of carrying out the project, … to mention the … saving and how IOI could benefit from carrying out this project. And why they should be doing it.

T Prem Anand: Any idea when this presentation were made? During what period?

E NB Sudhakaran (PW4): I think it was mentioned in one of the emails, if I can refer to it … on page 8, he writes to Mr Lee, to say that in continuation of our meeting on 9th December. Which means he had met Mr Lee and spoken on this so he was submitting the following points for consideration.

F T Prem Anand: So he presented it to you, to IOI's chairman, is this Mr Liaw, is the Chairman?

NB Sudhakaran (PW4): … Mr Lee is the one of the directors.

G *Identification evidence*

[45] Whilst under cross-examination and re-examination, PW4 had also specifically identified the defendant as the person he met on several occasions and responsible for disclosing the plaintiff's technology. PW4 also confirmed H the emails recovered during the forensic examination of the computer used by the defendant were received by him. The excerpts of the evidence below bear this out:

(pp 300–305 NOP vol 2)

I

Cross-examination of PW4

K Ramesh: You had a meeting with Raghunath.

NB Sudhakaran (PW4): Yes.

K Ramesh: In Sandakan?

NB Sudhakaran (PW4): Yes.

K Ramesh: In 2006? End … of 2006.

NB Sudhakaran (PW4): Yes, from that time onwards.

K Ramesh: Ah … is this the person …

NB Sudhakaran (PW4): Yes.

K Ramesh: … you talking about?

(counsel points to defendant, in the court gallery, who stands up)

NB Sudhakaran (PW4): Yes. That's him.

K Ramesh: Okay. Now, I refer you to this email ah … in 3001. You say you were corresponding with Raghunath, the Defendant.

…

NB Sudhakaran (PW4): Yes.

K Ramesh: Right?

NB Sudhakaran (PW4): Yes.

K Ramesh: And this email is addressed to Raghunath, the Defendant?

NB Sudhakaran (PW4): Err … yes. If you noticed, I'd written 'Dear Raghu …'

K Ramesh: Yeah, I know …

NB Sudhakaran (PW4): Yes.

K Ramesh: I am asking you a question, just answer.

NB Sudhakaran (PW4): The person sitting there.

K Ramesh: This Raghu?

NB Sudhakaran (PW4): Yes, that's him.

…

(pp 399–400 NOP vol 3)

Re-examination of PW4

T Prem Anand: … Mr Sudha, you confirm that on the 11th of March on the invitation of the Defendant you had visited the factory, Plaintiff's factory in Pasir Gudang?

NB Sudhakaran (PW4): Yes.

T Prem Anand: And … can you please tell the court, is the Defendant present in court today?

NB Sudhakaran (PW4): Yes. He's sitting there.

T Prem Anand: Is it, is it that person there?

NB Sudhakaran (PW4): Yes.

T Prem Anand: Now what makes you so sure that that is the Defendant? What is the distinguishing factors that you probably have in respect of that person?

NB Sudhakaran (PW4): He…s visited me several times and … I found him to be quite impressive and … also he is … you know … he had presented some technology which is… very interesting that other people have not and … you know, for awhile I visited the factory together with him in Johor Bahru and had lunch and … he's not someone you'd forget that easily because he's very charming as well.

T Prem Anand: Any physical attributes?

NB Sudhakaran (PW4): Yeah, … he's a handsome guy, he's tall, not someone you'd forget easily.

[46] Learned counsel for the defendant had assailed the evidence and credibility of PW4 on the following grounds. Firstly, PW4 testified that the defendant made the two visits to PW4's factory in Sandakan at the end of the year 2006. However, the defendant had produced evidence through his passport marked as exh D12(a–c) which clearly showed that the defendant never made any visits to the State of Sabah in the year 2006. Counsel argued that in examination-in-chief, PW4 confirmed that he first met the defendant when he visited PW4's factory in Sandakan at the end of 2006. In cross-examination he confirmed that the two visits by the defendant were in 2006. The first visit in 2006 was made by the defendant with one Maniam. The second visit in 2006 was made by the defendant with one Mr Ramani. Specific reference was made to the email dated 22 November 2006 at p 3029 of bundle K5 to confirm the dates of the visit. According to counsel PW4 confirmed that the first visit was before 22 November 2006 (the date of the email). The second visit was made in the month of December. PW4 had then confirmed that the security log book of his factory will confirm the exact dates of the visits as IOI had strict security measures with security records. Cross-examination of PW4 was then deferred to enable him to bring the records of visits to court. When cross-examination resumed on 14 March 2011 PW4 was then asked to produce the log book of the records of visits to IOI Edible's factory in 2006. He stated that all records of visits made in 2006 had been destroyed and that he only managed to find records in respect of visits made in 2007. When further challenged, according to learned counsel for the defendant, PW4 was desperately caught lying when he stated that the company's policy was to keep security records only for a maximum of two years. Counsel said that PW4 was caught off guard when asked to explain why he had with him the security records for the year 2007 when in fact the said records were four years old and by his own evidence should have been destroyed.

[47] Secondly, the defendant could not have taken PW4 to the plaintiff's factory in Pasir Gudang on 11 March 2007 because the defendant had left for Sabah on the 11 March 2007 and this is confirmed by the endorsement on his passport ie exh D12(c). These endorsements were in turn confirmed by the immigration officer DW3. Moreover, the defendant had confirmed in his evidence that he was in Sabah on 11 March 2007.

[48] I had given careful scrutiny to the evidence on these issues of the credibility and veracity of PW4 as a witness. From my observation of the demeanor of PW4 in the witness stand and my evaluation of his evidence as a whole, I found this witness to be forthright, candid and truthful. He had in my judgement, done very well in coming forth to testify in court and bared all about his visit to the plaintiff's plant in Pasir Gudang to view the highly confidential SBE boiler of the plaintiff, and revealing the visits that the defendant made to his factory in Sandakan. I found his identification of the defendant in open court credible and trustworthy as he had stated good and valid reasons why he could still recognise the defendant. Hence, I accepted his identification of the defendant as the person that he had met in Sandakan and the person that had led and guided him into the plaintiff's factory at Pasir Gudang on 11 March 2007.

[49] With regard the dates of the two meetings with the defendant in Sandakan, the defence had made it out as if PW4 was categorical that the visits were made at the end of the year 2006. Upon careful scrutiny of his evidence, in fact, through out his testimony, PW4 had maintained that he really could not remember with precision the dates of the visits. He had always maintained it was sometime at the end of the year 2006 and as pointed out earlier he had even stated right from the beginning during examination-in-chief that 'it's roughly end of 2006 and into 2007'. This latter statement from him could not be branded as an after thought. I reproduce below the relevant part of the evidence of PW4 to demonstrate my point that it was not true that he was dead certain that the dates of the visits were at the end of 2006:

(NOP vol 2 at pp 288–291)

Examination-in-chief of PW4

T Prem Anand: Ok. Mr Sudha. I would refer you to, to page 3029 of Bundle K5, which is Exhibit P7.

T Prem Anand: Page 3029 yes. Uh, is this an email that was sent to you, Mr Sudha?

NB Sudhakaran (PW4): Yes, it was.

T Prem Anand: And who sent you this email?

NB Sudhakaran (PW4): This was sent by Mr Raghu. … it was sent by Mr Raghu.

T Prem Anand: The Defendant, isn't it?

NB Sudhakaran (PW4): The Defendant, yes.

T Prem Anand: … can you please, … state, what was, where is it from, the part where it's written?

NB Sudhakaran (PW4): From k … co. India.

T Prem Anand: And the subject matter of the email?

NB Sudhakaran (PW4): Visit to IOI Sandakan.

T Prem Anand: Can you please, … read what was stated, … the contents of the email?

NB Sudhakaran (PW4): Dear Mr Sudhakaran, Sir, I hope you are doing great and in best spirit. Me, along with our director, Mr Naren Ravani, will be visiting Sabah for some meeting with other refineries during first week of December, we sincerely hope to meet you again during this time either in your Sandakan factory or KL office, wherever you are available and convenient to you. We also hope that we can have the proposed planned next phase of meeting with your management during this period. Our director is in Malaysia from 1st December to 8th December. If we can get appointment during this period, 4th to 8th December, it would be very nice. In any case, it would of great pleasure for us to meet you in Sandakan on 4th December, Monday at 9 a.m., if it's convenient to you. If you are in KL during this time, we can, we can meet you in KL also. Request you to let, let us know your convenience and preference so that we can plan accordingly. Many thanks in advance and kind regards. Raghu.

T Prem Anand: Can you tell the court the date of this email?

NB Sudhakaran (PW4): It was dated, Wednesday 22nd November 2006.

T Prem Anand: Do you confirm that this email was sent to you during that time?

NB Sudhakaran (PW4): Yes.

T Prem Anand: Did you meet the Defendant? In Sandakan?

NB Sudhakaran (PW4): I actually cannot remember whether this took place.

T Prem Anand: Did you ever meet the Defendant in Sandakan?

NB Sudhakaran (PW4): Many times.

…

T Prem Anand: And the occasion during the time when you met him?

NB Sudhakaran (PW4): … roughly. In the, as I'd said, towards the end of 2006 into 2007.

[50] Thus, as can be seen above, we have PW4, even in the face of the email dated 22 November 2006, saying that the dates of the meetings with the

defendant in Sandakan were 'roughly' towards the end of 2006 into 2007. He was not categorical that the visits were at the end of 2006.

[51] The portion of the evidence of PW4 relied on by counsel for the defendant to ground his submission is reproduced below:

(NOP vol 2 at pp 309–315)

Cross-examination of PW4

K Ramesh: … when was the first time he … came to, Sandakan in 2006?

NB Sudhakaran (PW4): I believe it was towards the end of 2006. As I said I don't remember the exact date.

K Ramesh: And … in 2006, at the end of 2006, … can you remember the frequency of the times you met this Raghunath in Sandakan?

NB Sudhakaran (PW4): In which year?

K Ramesh: In 2006, end of 2006. You said end of 2006, right?

NB Sudhakaran (PW4): Yeah, maybe two or three times. That's at the most, I don't think he came more than that.

K Ramesh: And … where did this meeting take place in Sandakan?

NB Sudhakaran (PW4): In my office.

K Ramesh: In your office?

NB Sudhakaran (PW4): Yes.

K Ramesh: And then, who … who else was with you at that time you met …?

NB Sudhakaran (PW4): There … was a gentleman by the name of Mr Maniam, the first time.

K Ramesh: Mmhmm …

NB Sudhakaran (PW4): … And the second time, if I'm not mistaken is the second time, it's with his boss, Mr Ravani.

K Ramesh: That is on their part, right?

NB Sudhakaran (PW4): Yes.

K Ramesh: He came … you say that he came with one Maniam first time …?

NB Sudhakaran (PW4): Yes.

K Ramesh: And then he came with his boss, called Ravani?

NB Sudhakaran (PW4): Yes.

K Ramesh: On your part, on the part of IOI? Who was there? No one else?

NB Sudhakaran (PW4): No one else?

K Ramesh: No one else. Now your office, huh …

NB Sudhakaran (PW4): Yes.

K Ramesh: In … Sandakan. What was it? Can you remember … you don't remember the dates, ah? You, would you be able to check with any documentation? You ah … Okay, sorry. Go back ah, when they visit you in the office, … I believe IOI has strict security … measures right?

NB Sudhakaran (PW4): Yes.

…

K Ramesh: So, if he had visited you … in your office, then there would been … visitor pass … issued to him?

NB Sudhakaran (PW4): Visitor pass, yes. Security records.

K Ramesh: Oh, and you have the security records?

NB Sudhakaran (PW4): It should be there.

K Ramesh: And would you be able to bring the security records?

NB Sudhakaran (PW4): I can …

K Ramesh: Now I want photos, security records … both you have with you la?

NB Sudhakaran (PW4): Photos meaning … the one …

K Ramesh: The photos la … boiler la … boiler

NB Sudhakaran (PW4): You are referring to the photos?

K Ramesh: Yes. Yes. You have it?

NB Sudhakaran (PW4): Yes.

K Ramesh: Now this … Maniam who ah … came on the first visit, is it?

NB Sudhakaran (PW4): If I'm not wrong.

NB Sudhakaran (PW4): If I'm not wrong.

K Ramesh: Okay. What … in what capacity did he come? As a representative of EcoOils, or representative of Raghunath or …

NB Sudhakaran (PW4): Maniam came as a friend. Of uh … Mr Raghunath.

K Ramesh: As a friend?

NB Sudhakaran (PW4): As a friend, that … as far as I know because he wasn't introduced as an associate or anything like that.

K Ramesh: Okay.

NB Sudhakaran (PW4): And … if … Now I remember …

K Ramesh: Oh … okay.

NB Sudhakaran (PW4): He was going to do any construction works if … Raghunath got the job.

K Ramesh: Okay, okay. So now … he brought two people along to see you in Sabah? The first time it was with Maniam.

NB Sudhakaran (PW4): Yes.

K Ramesh: Who you say that was the person that was entrusted to, to construct the boiler, is it?

NB Sudhakaran (PW4): Ah … that's what I was told.

K Ramesh: Okay, okay. And the second visit, was with … purportedly with his boss, called Bavani …? Eh?

NB Sudhakaran (PW4): Err … Ravani.

K Ramesh: Ravani ah?

NB Sudhakaran (PW4): Yes.

K Ramesh: Bavani is a lady's name.

NB Sudhakaran (PW4): Yes.

K Ramesh: … okay, … you have records in your company factory will show, that the people visited you at this particular dates.

NB Sudhakaran (PW4): Actually …

K Ramesh: In 2006 ah?

NB Sudhakaran (PW4): Yes, security records should show.

K Ramesh: Okay. You can bring the security records?

NB Sudhakaran (PW4): Yes.

[52] As can be seen from the evidence of evidence of PW4 above, he used these non-committal words 'I believe it was towards the end of 2006. As I said I don't remember the exact date'. This was in response to a question from counsel who persisted in suggesting that the time of the visits was at the end of the year 2006. Even on the security records issue, it was not PW4 that had first broached the point. It was counsel that suggested that there should be company records of visitors. PW4 was being accomodative to the defence in agreeing to bring the records to court. That is why, I rejected outright the submission of counsel that PW4 was desperately caught lying when he said that the security records for the year 2006 had all been destroyed because of the maximum two-year policy despite that he had in hand the 2007 record. I accepted his explanation that some stranglers might be around despite the maximum two-year policy. If he were a liar as the defence said, in my judgement, he would not have even bothered to bring the 2007 security record to court. For the reasons given above, I could not agree with the contention of counsel for the defendant that PW4's evidence of the visits by the defendant to Sandakan ought to be rejected. I was of the opinion that even if PW4 had been a little

unsure of the dates of the visits, it was not because he had deliberately told a lie. It was more out of a fading of memory of an event that occurred some years back the details of which no one can reasonably be expected to remember with accuracy.

[53] I turn now to the date of the visit to the plaintiff's factory. In my opinion, it is misguided to suggest that just because the defendant was in Sabah on Sunday 11 March 2007 he could not have been at the factory in Pasir Gudang the same day. There are 24 hours in a day; that is of course trite. The defendant could be in Pasir Gudang, Johor with PW4 at an earlier part of the day and then jet setting to Sabah the next moment. It is common knowledge that Sabah is accessible by air travel directly from Johor Bahru. In light of this coupled with the clear evidence of PW4 that was fortified by the production of his travelling claims documents, I found no merit in this second ground put forth by the defendant to discredit the evidence of PW4.

[54] Thus, quite clearly from the evidence and documents adduced through PW4 as adumbrated above, the plaintiff had sufficiently proved that the defendant had disclosed and misused the plaintiff's technology relating to the SBE Bio Mass Boiler and confidential information on its benefits, pricing, cost saving benefits, and specific requirements to PW4 and IOI Edible Oils Sdn Bhd.

Did the defendant establish KIS while he was employed with the plaintiff to disclose and disseminate the plaintiff's technology?

[55] I agreed with the submission of the plaintiff that the evidence is clear that the defendant had created and established Knowledge Integration Services (KIS) as a vehicle to masquerade the defendant's activities of disclosing and disseminating the plaintiff's confidential technology information or trade secrets to the third parties. This is the more obvious considering that it was only after the defendant had joined the plaintiff's employment on 17 February 2005 that the company known as Knowledge Integration Services (KIS) had surfaced or came to be established.

[56] The evidence as follows shows that Knowledge Integration Services (KIS) and its related companies were incorporated and established after the defendant had joined the employment of the plaintiff company:

(a) Knowledge Integration Services (India) PVT LTD was set up and incorporated on 28 September 2006; (found at p 155 of bundle B and exh D6);

(b) Knowledge Integration Services (Singapore) PTE LTD was set up and incorporated on 15 September 2007; (at p 155 of bundle B and exh D5); and

(c) Knowledge Integration Services Malaysia) Sdn Bhd was set up and incorporated on 23 September 2010; (found at p 17 of bundle B).

[57] The defendant had admitted under cross-examination that he is the managing director and shareholder of Knowledge Integration Services (India) Pvt Ltd and Knowledge Integration Services (Singapore) Pte Ltd respectively. Additionally, the evidence of PW4 and PW5 having met the defendant from Knowledge Integration Services (KIS) and the evidence of the defendant joining Knowledge Integration Services (KIS) and becoming the managing director and shareholder of KIS after leaving the plaintiff's employment all point to one irresistible inference that the defendant had established and was running Knowledge Integration Services (KIS) while he was employed with the plaintiff. The foregoing evidence also goes to show that the defendant was using Knowledge Integration Services (KIS) as a platform to disclose and disseminate the plaintiff's technology while quietly establishing his business at the same time.

THE COMPUTER FORENSIC EXAMINATION AND EXPERT EVIDENCE

[58] I am aware that the plaintiff had gone to great length and expense to prove its case by adducing computer forensic examination and expert evidence. The defendant had done likewise. For this, the plaintiff had appointed the renown computer forensic examiners, Deloitte Corporate Solution Sdn Bhd ('Deloitte'), whereas the defendant had appointed a company known as Cyber Intelligence Sdn Bhd.

[59] The forensic examination reports by Deloitte are contained in two separate reports as follows:

(a) computer forensic examination final report dated 7 January 2011 ('final report') contained in bundle C marked as exh P1 and bundle D marked as exh P2; and

(b) computer forensic examination supplementary report dated 17 January 2011 ('supplementary report') contained in the following bundles:

  (i) bundle K1 marked as exh P3;

  (ii) bundle K2 marked as exh P4;

  (iii) bundle K3 marked as exh P5;

(iv) bundle K4 marked as exh P6; and

(v) bundle K5 marked as exh P7.

[60] Three witnesses from Deloitte namely Mak Kum Choon ('PW1'); Ritchie How Hoong Wai ('PW2'); and Mus Ismadi Bin Sharom ('PW3') gave evidence in respect of the final report (exhs P1 and P2) and the supplementary report (marked as exhs P1, P2, P3, P4, P5, P6 and P7. PW1 is the executive director of Deloitte and is essentially responsible for signing off the computer forensic examination final and supplementary reports in bundle, C, D, K1–K5 which was prepared by Deloitte's staff ie Mus Ismadi bin Sharom (PW3) so as to ensure quality assurance has been undertaken prior to issuance of the reports, and to ensure that the process, all risks management policies processes and protocols have been complied or met. PW2 is a senior consultant of Deloitte tasked with the duty to collect the forensic imaging data from the hard disc drive of the computer used by the defendant while at the plaintiff's factory in Pasir Gudang, Johor Bahru. PW3 on the other hand is the senior manager of Deloitte and was responsible for carrying out the actual forensic examination of the imaged data obtained from the hard disc drive of the computer. The gist of their combined evidence is that Deloitte had forensically acquired an image of the hard disc drive ('HDD') and email data of the said computer and maintained a copy of the images of the HDD and email data found in the computer.

[61] Suffice to say that the plaintiff through its expert witnesses had led evidence of alleged documents and emails contained in the said computer to prove the alleged breach of the employment contract by the defendant. Worthy of note is the fact that the email dated 11 April 2007 sent by the defendant to PW4 that was recovered through the forensic examination of the computer (found at p 3068 bundle K5 (exh P7) is identical with the email found in PW4's computer (at p 3 of *ikatan dokumen tambahan plaintif* (exh P13).

[62] Learned counsel for the defendant had assailed the plaintiff's computer forensic evidence on grounds that (a) the integrity of the said computer was suspect (b) there was no evidence in respect of the chain of custody, care, control and usage of the computer from the date the defendant left the employment of the plaintiff until it was handed over to PW6 some six months later; and (c) the computer was not secured immediately once it had been identified as containing potential evidence to avoid being tampered with or being subject to 'accidental spoliation'.

[63] I was inclined to agree with the defendant that the plaintiff had failed to establish the chain of custody, care, control and usage of the computer from the date the defendant left the employment of the plaintiff until it was handed over to PW6. Further, the evidence showed that it was almost three years before the

computer was sent to Delloittes for forensic examination. This crucial break in the chain of evidence could not be disputed. The plaintiffs did not make any attempt to adduce any evidence of the proper measures or procedures adopted to secure its integrity. For these reasons, I did not put much weight to the findings of the computer forensic experts.

THE CASE FOR THE DEFENDANT

[64] Three persons testified in the defendant's case namely:

(a) Razana Md Salleh (DW1);

(b) the defendant himself (DW2); and

(c) Mohd Benyamin (DW3).

DW1 is the immigration officer whereas DW3 is the forensic expert of the defendant. The issues concerning which they had been called to testify had been dealt with above.

[65] The summary of the defendant's evidence is as follows:

(a) that he was appointed by the plaintiffs by the letter of appointment dated 17 February 2001 (pp 6–9 of bundle B);

(b) that he was appointed as manager for the engineering and project services and he was entrusted the responsibilities to maintain the machineries in the plaintiff's company and to execute projects;

(c) that part of his duties required him to visit the plaintiff's customers to ascertain the transport requirements for the collection of SBE;

(d) that his job scope was never related to any inventions. He was merely assigned to supervise and manage the maintenance department of the plaintiff and to execute projects;

(e) that he reports to Dr Saraph and occasionally to S Bhandari;

(f) that he was not assigned a personal computer but had to share the said computer with all executive category personnel;

(g) that his contract of employment was terminated based on the termination clause of the contract which is three months notice or payment in lieu of notice;

(h) that the plaintiffs did not make any allegation that his purported involvement with KIS when he was issued the letter of termination. Further, there was no domestic enquiry called against him and he was paid three months salary in lieu of notice;

(i) he has a Bachelor of Engineering ('BE') in Electrical and Electronics, post

graduate qualifications. Master Diploma in Business Administration ('MDBA'). His area of expertise involves electrical, automation, high tension electrical system and has considerable work experience in the field of mechanical engineering;

(j) he explained in detail the difference of the technologies of KIS and plaintiff;

(k) he stated that KIS is involved in the business of green technology and explained the origins of KIS;

(l) he further stated that KIS was invited by MPOB to present a paper at the Kuala Lumpur Convention Centre and the title of the paper was 'Waste Spent Bleaching Earth to Energy'; and

(m) he further testified that attempts were made by the plaintiffs to stop the presentation of the paper by KIS but to no avail. The plaintiffs did not proceed with the threat to institute committal proceedings.

THE COURT'S FINDINGS ON THE DEFENCE

[66] I agreed with the submission of the plaintiff that the defendant's case was one of bare denial of having misused, disclosed, and disseminated the plaintiff's confidential information or technology to the third parties. There simply was no evidence forthcoming to rebut the cogent evidence of PW4, PW5, PW6 and PW7 supported by documentary evidence that the defendant had misused and disclosed to the third parties the confidential technology and confidential information of the trade secrets of the plaintiff whilst under the employment of the plaintiff.

THE CONCLUSION

[67] For the reasons given above, I found and held that the plaintiff had proved on balance of probabilities that the defendant had used and disclosed the plaintiff's confidential technology on the use of SBE as fuel to produce energy and steam in the specially designed SBE Bio Mass Boiler and its trade secrets in the form of the confidential information on the cost, benefits, pricing, cost saving benefits, specific requirements of the SBE Bio Mass Boiler for his personal gain and benefit. By reason of that, I found that the defendant had breached the terms and conditions of the confidentiality clause in his letter of appointment.

WHETHER THE DEFENDANT IS REQUIRED TO BE RESTRAINED BY AN INJUNCTION FROM CONTINUING TO VIOLATE THE TERMS AND CONDITIONS OF THE CONFIDENTIALITY CLAUSE

[68] It has been held before that a permanent injunction is granted only after

the plaintiff has established its rights and the actual or threatened infringement of its rights by the defendant at the conclusion of trial (see *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632). Since the plaintiff had established its rights and the actual infringement of its rights by the defendant, they are entitled to the permanent injunction sought. As such, I made an order for a permanent injunction to restrain the defendant from using, divulging and disclosing to any third party the confidential information of the technology of the plaintiff on the use of SBE as fuel to produce energy and steam in the specially designed SBE Bio Mass Boiler or Non Electric Furnace and the trade secrets of the plaintiff ie the confidential information on the cost, benefits, pricing, cost saving benefits, specific requirements of the same.

WHETHER THE PLAINTIFF HAS SUFFERED LOSS AND DAMAGES AS A RESULT OF THE DEFENDANT MISUSING, DISCLOSING AND DISSEMINATING THE PLAINTIFF'S CONFIDENTIAL INFORMATION AND TRADE SECRETS

[69] A breach of confidence should be regarded as a tort with damages to be assessed to the successful plaintiff (see *Schmidt Scientific Sdn Bhd v Ong Han Suan* [1997] 5 MLJ 632 at p 701). For that reason, I ordered for assessment of damages before the deputy registrar.

THE INTEREST

[70] This was ordered at 4%pa on judgment sum from date of judgment to satisfaction.

THE COSTS

[71] To the plaintiff to be taxed unless agreed.

Claim allowed.

Reported by Ashok Kumar